

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CARMEL

THE PEOPLE OF THE STATE OF NEW YORK

-x

- against -

Indictment #: 39/96

AFFIDAVIT IN SUPPORT
OF MOTION TO VACATE
CONVICTION AND FOR
TESTING

ANDREW KRIVAK,

Defendant.

-x

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

ADELE BERNHARD, an attorney duly admitted to the practice of law in New York and counsel of record for the defendant, ANDREW KRIVAK, affirms the following under penalty of perjury:

1. I am a distinguished adjunct professor at New York Law School where I supervise the Post-Conviction Innocence Clinic – a clinical course. Students in the Post-Conviction Innocence Clinic represent a small number of individuals convicted of felony crimes in New York State who the Clinic believes, after investigation, are actually innocent and wrongly convicted. The Post-Conviction Innocence Clinic receives many letters asking for assistance and thoroughly screens all requests prior to starting a re-investigation. The Innocence Clinic represents Andrew Krivak in the above captioned action.

2. I am familiar with the facts and circumstances of this case. I make the assertions that follow on information and belief.

3. The sources of my belief are: the trial transcript in the trial of his matter and in the 2012 trials of Anthony DiPippo, Krivak's co-defendant, appellate and post-conviction briefs and decisions, available police reports, available laboratory reports, witness statements, interviews with witnesses, interviews with Krivak and members of his family, and all other prior proceedings had herein, and in particular the Court of Appeals decision reversing Mr. Krivak's co-defendant's case at *People v. DiPippo*, 27 N.Y.3d 127 (2016). Additionally, I have communicated with prior counsel for DiPippo, current counsel for DiPippo, individuals with expertise in post-conviction DNA litigation, forensic scientists, and individuals with expertise in crime scene analysis. I submit this affirmation in support of Petitioner Krivak's motion pursuant to C.P.L. §§ 440.10(1)(g) & (h), and § 440.30(1)(a) and the due process clauses of the federal and New York State Constitutions (NY Const. art 1 §6).

I. INTRODUCTION

4. In 1997, Andrew Krivak ("Krivak") and his co-defendant Anthony DiPippo ("DiPippo") were convicted for the rape and murder of a 12-year old girl, JW ("JW" or "victim"), who disappeared from her home on October 4, 1994.

5. No physical evidence connected Krivak or DiPippo to the victim or the crime scene. The key evidence consisted of false testimony that Putnam County Sheriff's Department ("PCSD") detectives manipulated a young and vulnerable witness, Denise Rose ("Rose") to adopt by using threats of being arrested and imprisoned for murder, and a false confession the PCSD coerced from the 18-year old Krivak by using lies and false promises.

6. New evidence shows that Krivak is likely innocent of the crimes, that false evidence was used at his trial, and that he deserves a new trial. His co-defendant, DiPippo, has

already been granted a new trial so that he will have the opportunity to present some of this new evidence.

7. The first category of new evidence consists of evidence pointing to Howard Gilbert (“Gombert”) as the likely perpetrator of the crimes. In April 2011, Joseph Santoro (“Santoro”), an inmate serving time with Gombert, overheard him confess in great detail to raping JW. Gombert is a convicted pedophile serving a prison sentence in Connecticut for abusing a nine-year old girl. *State v. Gombert*, 80 Conn. App. 477, 479, 836 A.2d 437, 441(2003); *Gombert v. Warden*, 2013 WL 4873470, *1, 2013 (Conn. Super LEXIS 1895*1, 2013). Gombert’s admission to Santoro is specific, relevant, internally consistent and includes details only the killer would know.

8. This spring, the New York Court of Appeals granted DiPippo a new trial so that he could present to a jury the new evidence about Gombert. *People v. DiPippo*, 27 N.Y.3d 127 (2016). The new evidence pointing to Gombert’s guilt necessitates a new trial for Krivak as well as it meets the definition of newly discovered evidence as defined by C.P.L. 440.10 § (1)(g). For the exact same reasons DiPippo is entitled to a new trial, Krivak is equally entitled.

9. In another development since Krivak’s trial, newly discovered evidence substantiates what Krivak and DiPippo had always contended at their trials: that PCSD coerced witnesses into adopting a story that the detectives concocted to explain JW’s death – a story based completely on the crime scene evidence and the autopsy report with which they were familiar. The PCSD strong-armed the vulnerable, young Rose to embrace their story and they then coerced the 18-year old Krivak to falsely confess to murder using the information and details they provided him.

10. The PCSD hid from Krivak the fact that the Carmel Police Department (“CPD”) suspected that Gombert killed another young girl, RM, who disappeared about the same time, and that the CPD believed the two cases were committed by the same man.

11. To obtain Krivak’s false confession, the PCSD engaged the services of Officer Daniel Stephens who, instead of seeking the truth, used the test to convince Krivak that a “cold, scientific and impartial instrument” proved he was lying and that he could only save himself from a life in prison by admitting to accidentally (instead of intentionally) killing JW. Recently, a federal jury found that as early as 1990, Stephens had conspired with detectives and used the polygraph machine to coerce a false murder confession from another youngster – the 16-year old Jeffrey Deskovic.

12. Moreover, new evidence also shows that PCSD detectives pressured the many witnesses who reported seeing JW after October 4, 1994 to change their recollections and deny their previous reports.

13. Significantly, the Conviction Review Unit of the New York State Attorney General’s Office and the former Putnam County District Attorney reviewed the Krivak and DiPippo convictions and determined through witness interviews that PCSD detectives Castaldo and Quick did indeed coerce Rose into falsely stating that Krivak and DiPippo committed the crimes. The new evidence of coercion necessitates a new trial for Krivak pursuant to C.P.L. 440.10 (1)(g) & (h).

14. New evidence in the form of DNA testing of the crime scene evidence conducted since the trial corroborates Krivak’s claim of innocence. Those test results show no evidence that JW was ever in Krivak’s van and none of the crime scene evidence - materials found with the

victim's remains - are connected to Krivak or DiPippo. Meanwhile, the DNA of some yet-unidentified individual was found with JW's remains.

15. Overall, new evidence proffered by Krivak reveals: (1) that materially false testimony was presented against him at trial; (2) that newly discovered evidence suggests a different perpetrator; and (3) that the PCSD engaged in acts of dishonesty, withholding of exculpatory evidence, and subornation of perjury to obtain his conviction. Accordingly, his conviction must be vacated pursuant to C.P.L. §§ 440.10(1)(g) & (h), and the due process clauses of the federal and New York State Constitutions (NY Const. art 1 §6).

16. Finally, significant additional forensic evidence remains that can be tested for DNA. There is a reasonably likelihood that such additional testing can conclusively establish who killed JW, or at least establish that Krivak did not. Accordingly, this Court should order additional DNA testing, pursuant to C.P.L. § 440.30(1)(a).

II. FACTUAL BACKGROUND

A. The PCSD Initially Classifies JW's Disappearance as a Missing Person's Case.

17. On October 3, 1994, a 12-year old girl, JW, left her home in Carmel, New York, after speaking to her mother on the phone. She did not return home that evening as was her normal pattern, and the following morning her mother called the PCSD to report her missing. (TT, April 7, 1997, testimony of Susan Wright at 13-15).¹

18. The PCSD interviewed JW's mother and her closest friend, and created posters, but otherwise treated the matter as a missing person case and expended little effort to find her. At

¹ Because page numbering is not sequential throughout the trial, references to the trial transcript are made to the date the witness testified and to the appropriate page number on that date. A full transcript is not attached to these papers, but one will be supplied to the Court upon request.

trial, Officer Castaldo testified that he regarded the case to be a missing person case from Oct 4, 1994 until November 22, 1995. (TT, April 7, 1997 testimony of Castaldo at 841-42, 891.)

19. During the following weeks and months, a number of people reported seeing JW after October 3, 1994. Some called the "tip line;" others contacted JW's mother; still others reported what they saw to the police. Among others are the following sightings:

- a. Alyson Clokey saw JW at the Danbury Mall on October 7, 1994 in the company of a number of large young men. Clokey reported this sighting to the police on the next business day, October 11. (*See Statement of Alison Clokey, dated 10.11.94 and transcript of Clokey's examination on 4.10.97, Attached as Exhibit 1.*)
- b. Lorraine McLaughlin saw JW at the same mall on October 7 or 8, 1994. She also reported this sighting to the police. (*See Statement of Lorraine McLaughlin, dated 11.2.94, Attached as Exhibit 2.*)
- c. Tracy Mulling received a phone call from JW on October 16, 1994. (*See Statement of Tracy Mulling, dated 10.26.94, Attached as Exhibit 3.*)
- d. Tina Scorza met JW in the Danbury Mall on April 20, 1995 and gave JW her phone number. (*See Statement of Tina Scorza, dated 4.20.95, Attached as Exhibit 4.*)
- e. Dennis Guariglia saw JW in October 1994 walking next to the road while delivering pizza. It was significant to him because he knew she had been reported missing. Guariglia reported the sighting to his friend, Jason Zaffino, who contacted JW's mother. (TT, April 10, 1997 testimony of Guariglia at 10-18).
- f. While walking her dogs, Myrtle Herbst saw JW walking on the sidewalk on at least three separate occasions in October and November 1994. On one occasion she

saw JW get into a car. (See Statement of Myrtle Herbst, dated 11.28.94, Attached as Exhibit 5.)

B. The Murder Investigation: November 23, 1995 - Arrest of Denise Rose April 1996.

20. On November 22, 1995, thirteen months after she was reported missing, a local hunter kicked a skull while walking in a wooded area near Fields Lane in Carmel. He carried it to his car and reported it to the PCSD. (TT, March 31, 1997, Testimony of Curry at 439).

21. Later that day, PCSD detectives searched the area and about 430 feet from the road they found decomposed skeletal remains and clothing, including a shirt, jacket, bra, size 7 underwear, shoes, and jewelry. (TT, April 4, 1997, Testimony of Rees at 631, 648, 652.) Crime scene technicians also found a rope looped around one of the victim's leg bones. (TT, April 7, 1997 at 650.)

22. Also on November 22, 1995, the remains were identified as JW. The case was reclassified from missing person to homicide. The crime scene evidence indicated JW had been murdered, but the remains provided few clues about what had happened to her. Neither the time nor the cause of death could be ascertained.

23. Dr. Edward McDonough, the state's forensic pathologist and Deputy Chief Medical Examiner for the State of Connecticut, opined that JW likely died between December 1994 and March 1995. He did not think that she had died as early as October 3, 1994 – the date the prosecution argued was the date of the murder. He said he “wouldn't go back as far as November of 1994 in estimating a date of death.” (TT, April 4, 1997 at 745:4-7.) He discussed the clothing found near the top of the victim's spine and discussed asphyxiation with clothing as a possible cause of death that could not be ruled out. He also testified that he could not rule out a gun shot or a knife wound as the cause of death. (TT, April 4, 1997 at 753-4.)

24. Separately, in their investigation of RM's death, the Carmel Police Department (CPD) conducted an independent search of the same area where JW's remains had been found six days later, on November 28. The CPD found a pair of size 7 pants 225 feet away from the skeletal remains, along with a knife and sheath. (TT, April 4, 1997, testimony of Rees at 656.)

25. The CPD considered Gombert a leading suspect in RM's death. RM disappeared under similar circumstances as JW and Gombert was the last person known to have seen RM the night she disappeared. (See Press Report dated 09.04.01, Correspondence between Lieutenant Karst and Gombert dated 3.27.03, and CPD Report dated 04.25.01, Attached as Exhibit 6.)

26. Multiple adults informed PCSD investigators Castaldo and Quick about their concerns related to Gombert. These residents perceived Gombert as sexually interested in young girls who lived in Carmel, and specifically noted he appeared interested in JW.

27. For example, Thomas Cornell told the PCSD he overheard Ellen Winne tell Gombert to stay away from JW. Cornell identified Gombert from a photograph that Officer Castaldo showed him. When police spoke to Winne, she told them that JW was due to start babysitting for the child Gombert had with Stephanie Conway. (See Statement of Thomas Cornell, dated 01.18.96, Attached as Exhibit 7, and statement of Ellen Winnie, dated 11.25.95, Attached as Exhibit 8.)

28. In July 1994, AF, yet another young girl from Carmel reported that she had been raped and sodomized by a man she believed to be Gombert. She was tied up with rope behind her back. Her underwear was wrapped around her head. (See Contemporaneous Reports, dated variously in the summer and fall of 1994 (before JW went missing) relating to the rape of AF, and Statements from AF's sister after AF's suicide, dated 03.31.15, Attached as Exhibit 9.)

29. Stephanie Conway, Gombert's girlfriend at the time JW disappeared, claims that Gombert assaulted and raped her and that she reported that activity to the police. (See undated Conway statement, Attached as Exhibit 10.)

30. Further, Anita Albano told police that she saw JW get into a red car driven by a young long-haired man who she identified as Gombert in a photo line-up prepared by the investigators. Gombert's girlfriend at the time, Stephanie Conway, drove a red car. (See statement of Anita Albino, dated 11.25.96 & 03.18.02, Attached as Exhibit 11.)

31. In sum, police knew from adult reporters that: JW was acquainted with Gombert, that Gombert was sexually interested in young women; that he had peculiar and distinctive sexual interests generally; and they knew JW had a reason to be alone with him. She had volunteered to babysit for one of his children.

32. For reasons that are not clear, PCSD detectives Castaldo and Quick disregarded Gombert as a suspect. Instead, they focused on Krivak and DiPippo, consistently asking residents for information about them even though not a single resident provided any concrete information linking them to the crime.

33. The PCSD uncovered no evidence connecting DiPippo or Krivak to the murder until they arrested 17-year old Rose in April 1996 for reckless driving and driving under the influence. The PCSD knew that she had dated DiPippo. They interrogated her about Krivak and DiPippo and whether they were connected to JW's murder. Initially Rose claimed to have no knowledge of any such connection. Through a series of interviews, over a three week period, Rose's position changed from initially denying knowing anything at all about JW's disappearance to eventually claiming to have been an intimate witness – on the scene. (TT March 27, testimony of Rose from the start of the day through 170.)

34. The PCSD interviewed Rose at least four times. During these sessions, and before Rose provided them facts, the detectives repeatedly told Rose their version of what had happened to JW and showed her photographs of the crime scene and JW's remains, continually pressing her to admit witnessing what they imagined happened. They threatened to arrest her as an accessory to the murder of JW and spend 25 years in prison if she did not adopt their narrative. Buckling under the relentless pressure, Rose signed a statement adopting the PCSD's version of the events and admitting to witnessing Krivak and DiPippo rape JW in Krivak's van. (See Statements of Rose, dated 04.02.94, and second and subsequent undated statement, Attached as Exhibit 12.).

35. The PCSD detectives did not arrest Krivak and DiPippo immediately after obtaining Rose's signature on the statement they wrote for her. They waited more than two months, until July 1, to make the arrests. During that time, the PCSD attempted to corroborate their hypothetical narrative by pressuring friends of Krivak and DiPippo to agree that they witnessed the crime. The detectives directly coerced and pressured Adam Wilson, William MacGregor and Michael Moynihan. They also persuaded Scott Olivieri and Dominick Neglia to wear wires to obtain inculpatory statements from Wilson, efforts that resulted in no incriminating evidence. (See Affidavit of Neglia, Attached as Exhibit 13, testimony of Olivieri attached as Exhibit 14, and Testimony of Adam Wilson at DiPippo's second trial, May 3, 2012 at 925-1002.)

36. In the end, the PCSD detectives were unable to convince any of Krivak and DiPippo's friends to corroborate the story the PCSD coerced Rose into adopting. At trial only Rose provided direct evidence of the defendants' guilt. Apart from Krivak's confession, no other witness confirmed the material elements of her story. In fact, Adam Wilson took the stand at DiPippo's second trial to explain how the PCSD pressured him and even drove him to the road

off of which JW's remains were found to ensure that he "got his story straight." (TT Adam Wilson at DiPippo's second trial at 936) The PCSD instructed Wilson to tell nobody about their efforts to instruct him on what story to say. *Id.*

37. Lisa Murphy and Gary Kempter provided the only corroboration of Rose's testimony. When they were interviewed 18 months later, they told the PCSD they could remember seeing Krivak with DiPippo, JW, Rose, Wilson and MacGregor at the Citgo station on the night of October 3, 1994. Their testimony was undercut by Charles Clarkson, then manager of the Citgo station, who worked that night, was under instructions to call the police to disperse such a group of teens, and reported to the PCSD that none of those teens was at the station on October 3, 1994. (See Statement of Charles Clarkson, dated 12.12.02, Attached as Exhibit 15.)

38. In fact, during the 18 months prior to the arrest of Krivak and DiPippo, despite JW having been reported missing, despite the display of posters asking for information about her, and the shocking discovery of her remains in November 1995, not a single person reported seeing JW at the Citgo station on October 3, 1994. And no one brought information to the PCSD – except information about Gombert. All "inculpatory" information relating to Krivak and DiPippo was developed by PCSD pushing young witnesses to provide information, and all the information was provided after the PCSD developed their narrative about how the crime was committed.

39. After the PCSD interviewed multiple witnesses unsuccessfully, they found several witnesses who claimed to recognize jewelry, alleged to have been found in Krivak's van when it was searched pursuant to an earlier unrelated arrest, as JW's. At trial, because of irregularities in the search and the subsequent inventory, the defense argued that the jewelry was not found in the

van at all. Further, that testimony was at best equivocal since no one testified to what JW was wearing such jewelry on the night she left home.

40. To eliminate inconsistent statements from impartial witnesses who saw JW after October 3, 1995, PCSD detectives Castaldo and Quick pressured those witnesses to change their recollections. For example:

a. In 1994 and 1995, Dennis Guariglia worked in Sal's pizza store in Carmel. JW visited the store frequently before October 3, 1994, and Mr. Guariglia knew her well. After JW was reported missing, Guariglia reported seeing her standing on the road in front of a house on Seminary Hill Road. Guariglia mentioned the sighting to a friend, repeated the information to JW's mother, and reported it to the police in December 1995, after JW's remains were discovered. A year or so later, in the fall of 1996, after the co-defendants were arrested and before their trials, the PCSD called Guariglia and told him to "change" his statement. Eventually, he capitulated and signed a police-prepared statement stating that he must have been mistaken and must have seen JW's sister, Cloe, rather than JW. (TT, April 10, 1997 at 1126-1143).

b. Tina Scorza, who was 18 years old in 1995, told Investigators Castaldo and Quick on November 26, 1995 - shortly after JW's remains were - that she saw JW in the Danbury Mall in January, 1996 spoke to her then about how her absence was worrying friends and family. (See Statement of Scorza, at *Exhibit 4*, first page.) After Rose adopted the PCSD narrative detectives re-interviewed Ms. Scorza on 11.28.98 and caused her to recant her statement and deny having seen JW after her disappearance. (See *Id.* second page.)

c. On October 11, 1994, Alyson Clokey told Detective Castaldo that she saw JW on October 7, 1994. (See Statement of Clokey, at Exhibit 1, first page.) Then, on November 26, 1995, only a few days following the discovery of JW's remains, Clokey gave Quick another statement – now saying that she wasn't sure exactly when she had seen JW. (See *Id.* at second page.) And, a year after that, on October 23, 1996, after the co-defendants were arrested and before their trials began, Clokey told PCSD Investigator Quick that she "did not see [JW] on October 7, 1994 at the Danbury mall in Danbury, CT." (See *Id.* at fourth page.) A week later, on October 30, 1996, Clokey gave yet a fourth statement to Castaldo, explaining exactly how she had become confused based on what PCSD detectives showed her. (See *Id.* at fifth page.) Clokey ultimately testified at Krivak's trial that she was certain she saw JW on October 7, 1994, and any later confusion about the issues resulted from the PCSD showing her a document that misled her about the dates. (See Transcript of Clokey interview, Attached at Exhibit 1, and TT, April 10, 1997 at 1065-1091, 1089:13-1090:6.)

C. Forensic Evidence.

41. The PCSD collected materials from the interior of Krivak's van, which they illegally confiscated from an earlier arrest and searched it after obtaining the statement from Rose and sent the recovered materials to a laboratory for DNA testing. No trace of the victim's biology was found in the van. No forensic evidence linked Krivak's van or either of the co-defendants to JW's murder. (See 1996 DNA test results, Attached as Exhibit 16.) At trial, the prosecution stipulated that none of the materials collected from Krivak's van linked him to the murder.

D. Andrew Krivak's Arrest and Interrogation.

42. On July 1, 1996, at 11:30 a.m., PCSD detectives Castaldo and Quick arrested Krivak, who was then 18 years old. The investigators did not call his father. They did not bring him an attorney. They proceeded to interrogate him. They said DiPippo implicated him in the rape and murder of JW – which not true.

43. At 1:55 p.m. Krivak requested a polygraph test, believing it would show his innocence. The PCSD brought in polygraph operator Daniel Stephens. Stephens was not a neutral observer; he worked for the PCSD and was a part of their law enforcement team.

44. Since Krivak's trial, new evidence, not then available, reveals that Stephens played a key role in the wrongful conviction of at least one other man in New York State. Stephens gave a polygraph exam to Jeffery Deskovic and that exam contributed to Deskovic's falsely confessing to rape and murder. Like Krivak, Deskovic was a teen – only 16 years old – when Stephens subjected him to a fake polygraph exam, the supposedly incriminating nature of which was used to obtain a false murder confession. See *Deskovic v. Peekskill*, 894 F. Supp.2d 443 (2012); Transcript, 07-CV-8150 at 1084-85 (Oct. 23, 2014). DNA evidence proved Deskovic was actually innocent of the crime to which he falsely confessed. He was fully exonerated, and a federal jury found that Stephens had conspired with federal officers to deprive him of his civil rights and to fabricate evidence. *Id.*

45. Upon information and belief, Stephens conducted the polygraph test in order to tell Krivak that he had failed, to demoralize him, and to thereby convince Krivak it would be in his best interest to confess to accidentally killing JW. The ploy worked. Seven hours after he was taken into custody, after many hours of interrogation, testing and deceit, Krivak signed a

statement that Castaldo wrote for him, confessing to raping and murdering JW, using almost the same words the officers had provided Rose. (See Krivak Statement, Attached as Exhibit 17.)

E. The Trials and Post-Conviction Proceedings.

46. Krivak was tried separately from his co-defendant, DiPippo.

47. At Krivak's trial, Detective Castaldo introduced Krivak's confession and Krivak's defense attorney was permitted to call a polygraph expert to explain that Krivak's polygraph test actually showed he was telling the truth when he denied responsibility for the rape and death of JW.

48. Defense counsel called Clokey, Herbst and Guariglia to tell the jury that they saw JW after October 3, 1994.

49. The jury convicted. On June 11, 1997 the Court sentenced Krivak to serve 25 years to life in prison. The Appellate Division affirmed. *People v. Krivak*, 265 A.D.2d 343 (2nd 1999).

50. Immediately thereafter, DiPippo was tried. He took the stand and denied committing the crime. He was convicted on June 5, 1997 and sentenced to serve 25 years to life on July 11, 1997. On October 4, 1999, the Appellate Division Second Department affirmed the conviction. *People v. DiPippo*, 275 A.D.2d 340 (2nd Dept. 1999). DiPippo filed four post-conviction C.P.L. § 440.10 motions. The fourth motion to vacate argued that he was deprived of effective assistance of counsel because his retained trial counsel had previously represented Gombert, who was then a possible suspect in the murder of RM. The trial court held an evidentiary hearing on the conflict issue and afterwards denied the motion.

51. The Appellate Division reversed and ordered a new trial for DiPippo "because his attorney had operated under a conflict of interest" by having previously represented the other

likely suspect, Gombert. *People v. DiPippo*, 82 A.D.3d 786, 787 (2nd Dept. 2011), *Iv. denied* 17 N.Y.3d 903 (2011).

52. "Witness statements and police reports from that initial investigation indicated that [RM] was last seen in a car driven by Gombert." *Id.* at 787.

53. The Appellate Division concluded that counsel's failure to disclose his prior representation of Gombert to defendant or to the trial court, combined with counsel's failure to "conduct even a minimal investigation" into Gombert's potential involvement in the crimes for which defendant stood accused, demonstrated that the conflict operated on counsel's representation of defendant. *Id.* at 791.

F. New Evidence Post Conviction.

54. Following conviction, Krivak discovered significant new evidence not known to him at the time of trial: (a) an overheard confession by Gombert – a man who was always a suspect in the murder of JW – the facts of which are corroborated by credible witness observations; (b) evidence showing that investigators coerced false confessions from key witnesses; (c) Brady evidence revealing that the PCSD concealed evidence that the Carmel Police Department believed Gombert may have been responsible for the murder of JW; and (d) evidence showing that the polygraph operator violated his duties by fabricating false test results.

1. Gombert's Confession

55. During DiPippo's retrial, he "sought to admit evidence suggesting that Gombert was the perpetrator of the crimes with which [he] was charged." *People v. DiPippo*, 27 N.Y.3d 127 (March 29, 2016). T evidence forms the primary basis for this motion.

56. Significant new incriminating evidence about Gombert developed after Krivak and DiPippo's convictions. That evidence includes, as highlighted by the Court of Appeals:

a. “[T]he affidavit of Joseph Santoro, who was incarcerated with Gombert in Connecticut and claimed that Gombert had made incriminating admissions in April 2011 with respect to his involvement in the victim's death.” *Id.* at 132. (See Statement of Santoro, Attached as Exhibit 18.) Santoro's affidavit explained how Gombert admitted that he used deception about a babysitting job to lure the victim into his car, that he “persuaded her” to have sex against her will in a red car, and how he considered himself “in the clear” for criminal charges because “they already got those other guys/suckers” for the crime, meaning Krivak and DiPippo. *Id.* at *DiPippo*, 27 NY3d at 132. Santoro's affidavit also states that Gombert told him that another missing girl last seen with Gombert “would never be found by the police.” *Id.* at 132.

b. Persuasive corroboration of Gombert's statement. As the Court of Appeals put it, “Most significantly, almost all of Gombert's claims, as recounted by Santoro, were corroborated by outside sources, including the fact that Gombert knew the victim, the circumstances under which he had met her, that they had discussed having her babysit for his child, that Gombert had access to a vehicle generally matching the description of the car as given to Santoro, and that Gombert knew the other identified missing girl.” *Id.* at 133. (See also, Statement of Winne, *supra* at Exhibit 8.)

c. On the last day the victim was seen alive, witness Anita Albano saw the victim get into a red car with Connecticut plates driven by a person the victim appeared to know. *Id.* at *11. When presented with a photo array that included a picture of

Gombert, Ms. Albano stated his picture looked like the driver. *Id.* at 133 (See Statement of Albano, *supra* at Exhibit 11.)

d. Evidence also indicated that “at least two other victims of sexual assaults by Gombert—both of whom, like the victim here, were known to Gombert prior to the assaults and were children at the relevant times—alleged that Gombert had sexually assaulted them, on some occasions in the woods, while restraining their hands (in at least one instance with a rope in a “hogtied” fashion), and shoved articles of clothing in their mouths. Taken together, these characteristics of the alleged rapes and, in particular, the shoving of the clothing in the victims’ mouths—which is consistent with the state of the victim’s body when it was found and the prosecution’s theory of the potential cause of her death—are sufficiently unique for those bad acts to qualify as modus operandi evidence connecting Gombert to the victim’s death.” *Id.* at 139. (See Statement of AF, *supra* at Exhibit 9 and Statement of Conway, *supra* at Exhibit 10.)

57. In sum, the Court of Appeals held that, if proven at trial, the evidence DiPippo asked the court to admit at trial would demonstrate that “Gombert knew and had access to the victim; he was familiar with the road near which the victim’s remains were found; he had a history of allegedly assaulting other young girls with whom he was familiar in a manner uniquely similar to the prosecution’s theory of how the victim was killed; and that Gombert allegedly made statements indicating that he had sexually abused the victim around the time of her disappearance and that defendant and Krivak were prosecuted for crimes that he had committed.” *Id.* at 139.

58. The Court said that the evidence “would have been admissible” and “when Santoro’s proposed testimony is considered in combination with the additional proffered

evidence, defendant's third-party culpability proffer was compelling and highly probative of the question of who killed the victim." *Id.*. And, the Court found there was no obvious motive for Gombert to falsely implicate himself; that it was in his best interest to keep quiet about the supposed innocence of defendants; that there was no evidence that Gombert had a mental condition that would explain his admissions, and that the statement itself was internally consistent and coherent, with no apparent contradictions. As a result, the Court of Appeals held that the admissions to Santoro were indeed declarations against penal interest - not hearsay - and should have been introduced at the trial.

59. Based on a careful analysis of the new evidence, presented to the trial court before the start of DiPippo's second trial, in affidavits and through witness testimony, the Court of Appeals held Santoro should have been permitted to repeat Gombert's statement for the jury; the jury should have learned about Gombert's "history of allegedly assaulting other young girls with whom he was familiar in a manner uniquely similar to the prosecution's theory of how the victim was killed"; and "that Gombert allegedly made statements indicating that he had sexually abused the victim around the time of her disappearance and that defendant and Krivak were prosecuted for crimes that he had committed." *Id.*

60. The new trial for Anthony DiPippo is scheduled to begin after September 5, 2016.

2. Corroboration of PCSD Witness Coercion.

61. While still in prison and before the Court of Appeals granted his appeal, DiPippo contacted the Conviction Review Unit of the New York State Attorney General's Office and asked them to investigate his prosecution and conviction. Assistant Attorney General Gail Heatherly accepted his case for review.

62. On information and belief, as part of that re-investigation, AAG Heatherly and former Putnam County District Attorney, Adam Levy, interviewed Rose in Florida. Lt. Brian Karst and Investigator Michael Leahy from accompanied them.

63. They informed Rose and her parents that they were reviewing the case against Krivak and DiPippo. They stated they were investigating the conduct of Detective Castaldo given his pending indictment (now dismissed) charging, among other things, offering a false instrument for filing.

3. Evidence Showing Polygraph Operator's History of Fabricating Test Result for Purpose of Obtaining False Confessions.

64. When Krivak was first arrested for JW's murder, he denied any knowledge of the crime. In order to establish his innocence, he asked to be given a lie detector test, believing it would be fairly administered to support the truth. (TT, April 8, 1997 at 1022:7-14) Instead of being administered an impartial test, PCSD investigators sent Krivak to have a polygraph test administered by Daniel Stephens, another PCSD investigator.

65. Stephens administered a polygraph test to Krivak using the discredited Arther's Examination Procedure. (TT, April 8, 1997 at 1012:6-9). This procedure is particularly prone to errors with the actually innocent. At the conclusion of the test, Stephens testified that he formed an opinion that Krivak had been lying based on his "training and experience," and that it would

be impossible for anyone to render an opposing opinion had they not observed the actual examination. (TT, April 8, 1997 at 1013:14-1014:8).

66. Stephens told Krivak the polygraph was a “cold, scientific and impartial instrument” that proved he was lying about JW’s death. (TT, April 8, 1997 at 1008:12-17; 1045:12-14). Stephens first introduced the idea to Krivak about an accidental or intentional killing and that he would get a lighter sentence if it was accidental. (TT, April 8, 1997 at 1008:12-1009:8; Transcript, December 16, 1996 at 145:19-135:4). Krivak thereafter signed a confession written out by Castaldo.

67. In 2014, a jury in the federal lawsuit found that during a polygraph examination taken by Stephens in January 1990, he had used the Arther Examination Procedure to fabricate evidence in connection with the murder of a female teenager. The jury further found that Stephens had conspired with police department detectives in that case to coerce a false confession and to violate the suspect’s constitutional rights. *Deskovic v. Peekskill*, Transcript, 07-CV-8150 at 1084-85 (Oct. 23, 2014)

4. Undisclosed Brady Material

68. DA Levy also informed DiPippo’s counsel that certain relevant notes created by the CPD had not been disclosed to defense counsel at or before DiPippo’s trial. (See CPD Notes, Attached as Exhibit 19.)

69. The nondisclosed notes demonstrate that the CPD - a neighboring police department - believed the murder of JW was related to the murder of RM, another young girl who disappeared around the same time as JW, and shows that the CPD believed Gombert was

responsible for the murder of RM. Both JW and RM were from Carmel, each was reported missing within several months of each other. *Id.*

70. The PCSD concealed and failed to disclose the information it received from CPD which suggested that CPD believed the cases were related and that Gombert was responsible for both murders.

71. Had the CPD notes been disclosed, Krivak's counsel could have used them at trial to raise a reasonable doubt as to Krivak's guilt. The PCSD actively misled the CPD and defense counsel about Gombert's connection to the disappearance of the two missing girls.

G. Demand For Testing Under C.P.L. § 440.30.

72. During the pre-trial investigation, materials collected from Krivak's van were subjected to DNA testing by a private laboratory. No biological material recovered linked Josette Wright to his van. (See 1996 DNA test results, Attached at Exhibit 16.)

73. More recently, certain specimens taken from the van, that had appeared to contain both male sperm and female characteristics, were subjected to further DNA analysis by the New York State Police Laboratory. The materials were compared to DNA from both JW and her mother Susan with no match. (See 2010 MitoTyping test results, Attached as Exhibit 20.)

74. In April, 2015, the New York State Police Forensic Investigation Center issued a Biological Science Serology Case Report reviewing all of the crime scene evidence in this matter. Much of the crime scene evidence has been subjected to DNA testing. None of the evidence links either of the defendants or the van to the victim. (See 2015 NYS Police Crime Lab Report, Attached as Exhibit 21.)

75. The current summary of all material that could be subjected to testing, prepared by the New York State Police Forensic Investigation Center, reveals that there is still untested

evidence which could either undercut or corroborate the prosecution theory that Krivak and DiPippo raped and suffocated JW in Krivak's van. (See NYSP FIC Report at Exhibit 22.) The existing evidence which can be tested today with new and sophisticated forensic techniques includes:

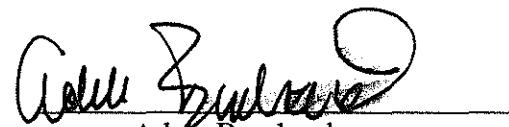
- a. The rope was found with JW's bones. The prosecution argued at trial that the rope was used to bind the victim. It can now be tested for touch DNA. If the perpetrator used the rope to bind the victim, his DNA may be on that rope.
- b. Hairs found on the rope. The rope used to tie JW contained multiple hairs. Several hairs have been tested. JW was excluded as the source of at least two of the hairs, as were Krivak and DiPippo. If the perpetrator used the rope to bind JW and or to carry her more than 400 yards into the forest, the hairs on the rope that do not belong to JW might belong to the perpetrator.
- c. A pair of jeans was found near JW's remains. The Forensic Center's Serology Case Report shows that examination of the fly/crotch area of the jeans indicates the presence of seminal fluid. The prosecution argued at the trial that the killer raped the victim. If there is seminal fluid on the victim's clothing it might reveal the perpetrator. Also, if the jeans contain JW's DNA, it would establish they belonged to her and thereby discredit the statements about what happened to the jeans contained in Rose's statement and Krivak's "confession."
- d. The bra found with JW's remains. The prosecution argued at trial that the killer removed JW's bra and tied it around her head. The FIC Report also indicates that a trace taping and swab of the knot were obtained but no examination was conducted. Further, two stained cuttings were obtained on which screening tests indicated the

presence of blood. The bra found with JW's remains contained hairs in the knot. A 2010 mtDNA test excluded Krivak and DiPippo as the source of all hairs on the rope, and excluded JW as the source of two hairs, but no additional testing could be done on those hairs. If hairs from JW's bra can be tested and matched, it could reveal her killer.

e. A knife and sheath were found near JW's remains. Presumptive testing was inconclusive about whether they contained blood, but swabs taken of the blade and sheath was preserved for DNA testing. If the knife or sheath contains any of victim's DNA, it would discredit the prosecution's theory of the case and reveal that the statements coerced from Rose and Krivak are false.

WHEREFORE, Petitioner Krivak respectfully requests that this Court GRANT his Motion to Vacate Conviction and Sentence pursuant to NY CPL §440.10 (1)(g). If the People do not join in the Petitioner's motion for relief, Petitioner requests this Court set a schedule for an evidentiary hearing, additional briefing, and oral argument on the Motion; and

In the alternative, Petitioner respectfully requests that this Court GRANT his Motion for Additional Testing on the crime scene evidence.



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Dated: August 13, 2016

To: Hon. Robert A. Neary
Hon. Robert Tendy
Clerk of the Putnam County Court